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IN THE

United States Supreme Court

October Term, 1970

No. 381

ELI S. JENKINS, III, *Petitioner*,

v.

THE FLORIDA BAR, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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September 4, 1970

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United States Supreme Court

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No. 381

ELI S. JENKINS, III, *Petitioner*,

v.

THE FLORIDA BAR, *Respondent*.

BRIEF FOR THE FLORIDA BAR IN OPPOSITION TO PETITION FOR CERTIORARI

Question Presented

Although Petitioner has listed four questions as being raised by his Petition for Certiorari, Respondent submits that the Petition actually raises only one question:

> Whether the Due Process and Equal Protection clauses of the Fourteenth Amendment are violated by Rule 11:07(3) of the Integration Rule of The Florida Bar (adopted by the Supreme Court of Florida) which provides that if an attorney is found guilty of a felony by a court of competent jurisdiction his right to practice law shall be suspended without an evidentiary hearing even though an appeal from his conviction is pending.

Statement of the Case

On March 11, 1970, following a seven-week jury trial in the United States District Court for the Middle District of Florida, Petitioner, an attorney and a member of The Florida Bar[1], was convicted of violating the White Slavery Traffic Act, Title 18, U.S.C. §2422. Violation of this act is a felony.

Rule 11:07 of the Integration Rule of The Florida Bar which was adopted by the Supreme Court of Florida under Article V, §23 of the Florida Constitution provides that the determination by a court of competent jurisdiction that a member of The Florida Bar is guilty of a felony "shall be conclusive proof of the guilt of the offense charged for the purposes of these rules." The rule goes on to provide that when a judgment of guilt is entered by a court other than a court of the State of Florida, the convicted attorney shall "stand suspended as a member of The Florida Bar on the 11th day following the filing with the Clerk of the Supreme Court of a certified copy of the judgment." Under the rule, the suspension continues until final disposition of the convicted attorney's appeal or until the convicted attorney shows good cause for terminating the suspension.[2]

On March 12, 1970, The Florida Bar, pursuant to Rule 11:07, filed a copy of the judgment of guilt with the Supreme Court of Florida, together with a petition requesting that Petitioner be suspended from the practice of law. In his response, Petitioner admitted all of the material allegations of

1. The Florida Bar is a corporate body created by and existing under the authority of the Supreme Court of Florida. All lawyers in Florida are required to be members. The Bar has been charged by the Supreme Court of Florida with the maintenance of professional standards in the practice of law. To that end it has been vested as an official arm of the Court with the powers and authority described in the Integration Rule of The Florida Bar. The Integration Rule is reproduced in 32 FLA. STAT. ANN. pp. 497, et seq., as amended, 225 So.2d 881 (1969).

2. The text of Rule 11:07 is attached as Appendix 1.

the petition, including his conviction. He alleged, however, that in convicting him, the United States District Court had committed various specified errors, that an appeal from his conviction was pending and that he and his counsel believed the conviction would be reversed by the Court of Appeal. The issue of whether Petitioner should be suspended was argued orally before the Florida Supreme Court, but no evidentiary hearing was held. On April 7, 1970, the Supreme Court entered an order suspending Petitioner as a member of The Florida Bar until further order.

Argument

Respondent respectfully submits that the Petition for Certiorari does not raise a Federal question of substance which was decided in a way not in accord with the applicable decisions of this Court.

A state may take reasonable steps to protect the public from those who may be unfit to practice law.

The decisions of this Court make it clear that although the right to pursue one's chosen profession is a precious liberty which may not be arbitrarily taken away, the state has a legitimate interest in protecting the public by supervising the fitness of those who practice law.

A state cannot exclude a person from the practice of law in a manner or for reasons that violate the Fourteenth Amendment; however, a state may require high standards of qualification, such as good moral character, if the requirements have a rational connection with an applicant's fitness to practice. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). A state may require continuing professional and moral fitness as a condition to an attorney's retention of the right to practice. *Cohen v. Hurley*, 366 U.S. 117 (1961).

The State of Florida has determined that conviction of a felony creates sufficient doubt as to an attorney's continued qualifications to warrant his suspension until the doubt is resolved.

Rule 11:07 represents a determination by the State of Florida that when an attorney has been convicted of a felony a grave doubt exists as to his fitness to practice law. It represents a further determination that protection of the public requires that the attorney be suspended until that doubt is finally resolved.

The rule does not permit imposition of conclusive disciplinary action until the attorney's guilt or innocence is finally determined. It simply requires that he be suspended until the case is finally decided. If the convicted attorney appeals and is finally acquitted, the rule contemplates that his suspension will be terminated. If the judgment of guilt is affirmed, the Supreme Court of Florida must then determine what discipline should be imposed. No disciplinary action may be taken unless the attorney's conviction is affirmed.

Conviction of a felony by a court of competent jurisdiction is a reasonable ground for suspension.

Conviction by a court of competent jurisdiction carries with it a presumption of correctness. This presumption provides a sufficient rational basis for a state to take action to protect the public pending the convicted attorney's appeal.

On August 12, 1970, the House of Delegates of the American Bar Association approved a report of the Association's Special Committee on Evaluation of Disciplinary Enforcement. The Report, entitled "Problems and Recommendations in Disciplinary Enforcement," outlines in the following language the dangers to the public if a convicted attorney is allowed to continue his practice pending appeal:

> The consequences of permitting the convicted attorney to continue to practice are not limited to the adverse effect

upon the reputation of the profession. The clients of the convicted attorney suffer also. One who is unaware of the conviction might retain the attorney and unwittingly compromise his rights. Adversary counsel aware of the conviction may be reluctant to negotiate with the attorney, to enter on a settlement with him, to entrust him with an escrow fund, or to be associated with him of counsel. These are all circumstances totally unrelated to the merits of the client's cause, and they may impair it. Moreover, the conviction may be affirmed and the attorney sent to prison while the new client's claim is pending. The client will then be forced to employ new counsel, who will have to familiarize himself with the matter. This means more delay and considerable duplication of expense to the client.

There is a further threat to the convicted attorney's client. The attorney, aware that the conviction ultimately will result in his disbarment, and, assuming that he has little to lose, he may engage in serious misconduct toward his remaining clients for his own personal gain. *Id.* 125.

The Report recommends that all states adopt "[a] court rule providing for suspension pending appeal of an attorney convicted of a serious crime . . . until final disposition of a disciplinary proceeding based on the conviction, with provisions for immediate reinstatement should the conviction be reversed." *Id.* 122.

The Report observes that:

The public is unable to comprehend . . . why an attorney convicted of a serious crime of any nature can continue to hold himself out as an officer of the court obligated to uphold the law and to support the administration of justice. *Id.* 123.

It concludes that:

No single facet of disciplinary enforcement is more to blame for any lack of public confidence in the integrity of the bar than the policy that permits a convicted attorney to continue to practice while apparently enjoying immunity from discipline. *Id.* 124.

The Report contains the following comment on the constitutional validity of the proposed rule:

> Some representatives of disciplinary agencies that appeared before this Committee in the course of its regional hearings expressed some doubt as to the constitutionality of suspending a convicted attorney while an appeal is pending. We do not share these doubts. Due process is satisfied if the attorney is advised of the charges, witnesses against him are produced and subjected to cross-examination and he is given the right to adduce testimony and to testify in his own behalf. These rights are all accorded to the attorney in the course of the prosecution. Moreover, while discipline may be imposed in a proceeding in which the standard of proof is only that which prevails in civil cases, guilt in the criminal case must be established by the far more exacting standard of proof beyond a reasonable doubt.
>
> It is significant to note that the procedure adopted by the Supreme Court of the United States in supervising the members of its bar includes suspension pending the conclusion of a disciplinary proceeding and the imposition of final discipline. Revised Rule 8 of the rules of that court provides that:
>
> > Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within 40 days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the 40 days if no response is made, the court will enter an appropriate order; but no order of disbarment will be entered except with the concurrence of the majority of the justices participating. *Id.* 127-128.

A copy of the relevant portions of the Report is attached as Appendix 2.

The necessity of protecting the public by suspending a convicted attorney has been recognized by other states which operate under rules similar to the Florida Integration Rule. *In re Flowers*, 230 So.2d 519 (Ala. 1970); *In re Gantt*, 230 So.2d 525 (Ala. 1970), *cert. denied*, 38 U.S.L. WEEK 3518 (June 29, 1970); *In re Minner*, 133 Kan. 789, 3 P.2d 473 (1931); *In re Fields*, 28 App. Div. 2d 34, 280 N.Y.S.2d 975 (1967). The Alabama Supreme Court recently said:

> The welfare of the profession and the preservation of the public confidence in its honor and integrity, demand the removal of the convicted attorney from his position of trust and responsibility. *In re Flowers*, supra 522.

It is customary in other instances to suspend rights for the protection of the public pending appeal from a conviction.

There are many instances in which suspension of a right has been regarded as necessary to protect the public pending appeal of a conviction. Some of these are:

1. *Bail pending appeal.* This Court has recognized that if granting bail pending appeal would jeopardize the safety of the community it would be irresponsible judicial action to grant bail. *Carbo v. U.S.*, 82 Sup. Ct. 662, 7 L. Ed. 2d 769 (1962); and that a bond may be higher after conviction than before. *Sellers v. U.S.*, 89 Sup. Ct. 36, 21 L. Ed. 2d 64 (1968).

2. *Public officeholders.* Under various statutes public offices are declared vacant upon conviction of the incumbent. Generally unless the statute specifically provides otherwise, the vacancy occurs when the judgment of conviction is rendered by the trial court. *McKannay v. Horton*, 151 Cal. 711, 91 P. 598 (1907); *State ex rel. Hunter v. Jurgensen*, 135 Neb. 136, 280 N.W. 886 (1938) *cert. denied* 307 U.S. 643; *People ex rel. Keenan v. McGuane*, 13 Ill.2d 520, 153 N.E.2d 168 (1958).

3. *Disqualification of electors.* For the purposes of determining the qualification of electors, conviction of a felony is

deemed to create a presumption of guilt which is not destroyed by a pending appeal. *State ex rel. Olson v. Langer*, 65 N.D. 68, 256 N.W. 377 (1934).

4. *Suspension of driver's licenses.* For the protection of the public, driver's licenses may be suspended upon conviction of certain offenses. These statutes are generally held to require suspension of driver's license upon the entry of the judgment of guilt even though an appeal is pending. *Parker v. State Highway Department*, 224 S.C. 263, 78 S.E.2d 382 (1953).

There was no need for an evidentiary hearing.

Petitioner contends that the Fourteenth Amendment required the Florida Supreme Court to give him an evidentiary hearing at which he could present witnesses and evidence. The only purpose of such a hearing would be to reconsider Petitioner's guilt, or perhaps to review the alleged errors made by the United States District Court in convicting him. If Rule 11:07 is valid, the Supreme Court of Florida had no duty to inquire either into Petitioner's guilt or into any mitigating circumstances. As this Court stated in *Berman v. U.S.*, 302 U.S. 211 (1937):

> Petitioner stands a convicted felon and unless the judgment against him is vacated or reversed he is subject to all the disabilities flowing from such a judgment. The record discloses that petitioner is a lawyer and by reason of his conviction his license was subject to revocation (and petitioner says that he has been disbarred) without inquiry into his guilt or innocence . . . His civil rights may be determined solely by reference to the judgment. *Id.* 213.

The only factual issue was whether Petitioner was in fact convicted. Petitioner admitted his conviction in the paper he filed with the Supreme Court of Florida. Hence, there was no need for an evidentiary hearing.

The suspension was properly of indefinite duration.

Petitioner complains because he was suspended until further order of the Florida Supreme Court. Rule 11:07 contemplates that the suspension of a convicted attorney will be terminated if the conviction is reversed on appeal. Since the conviction was in a Federal court, the Florida Supreme Court cannot take judicial notice of any reversal. It must be brought to the Court's attention by a motion. If the conviction is reversed, Petitioner may apply to the Florida Supreme Court for a termination of his suspension. If the Florida court should refuse to terminate the suspension, the issue of whether its action was proper may be brought to this Court. Until that time, Petitioner's contention is premature.

Conclusion

For the reasons stated it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

Integration Rule of the Florida Bar
225 So.2d 881 (1969)

RULE 11:07. DISCIPLINE UPON CONVICTION

(1) *Determination or judgment of guilt.* Determination or judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction upon trial or plea of any crime or offense that is a felony under the laws of this State, or under the laws under which any other court making such determination, or entering such judgment exercises its jurisdiction, shall be conclusive proof of the guilt of the offense charged for the purposes of these rules. Upon such determination or entry of such judgment of guilt by any court of this state, the judge or the clerk thereof shall transmit a certified copy of such determination or judgment to the Clerk of this Court and to the Executive Director of The Florida Bar.

(2) *Suspension by judgment (Florida).* If such judgment of guilt is entered by a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following the entry of the judgment unless he shall before that day file a petition with the Supreme Court to modify or terminate such suspension as elsewhere provided. If such petition is filed on or before the 10th day following the entry of the judgment, the suspension will be thereby deferred until entry of an order upon the petition.

(3) *Petition to modify or terminate suspension.* At any time after the entry of a judgment of guilt, the convicted attorney may file a petition with the Supreme Court to modify or terminate such suspension and shall serve a copy thereof upon the Executive Director. An opportunity to respond to the petition and appear at any hearing on the petition shall be afforded to The Florida Bar. If such petition is filed after the tenth day following the entry of judgment of guilt, the suspension shall

remain in effect pending disposition of the petition. Modification or termination of suspension shall be granted only upon a showing of good cause.

(b) *Continuation of suspension until final disposition.* If an appeal is taken by the convicted attorney from the judgment of this trial court in the criminal proceedings, and on review the cause is remanded for further proceedings, the suspension shall remain in effect until the final disposition of the criminal cause unless modified or terminated by the Supreme Court as elsewhere provided.

(c) *Termination of suspension.* Such suspension shall continue until final disposition of the criminal cause unless sooner terminated by order of the Supreme Court as elsewhere provided. A final disposition of the criminal cause resulting in acquittal will terminate the suspension. A final termination of the criminal cause resulting in a determination or judgment of guilt shall continue the suspension until expiration of all periods for appeal and rehearing, and until after termination of disciplinary proceedings by The Florida Bar as elsewhere provided.

(3) *Suspension by judgment* (other than by state court). If any such determination or judgment of guilt is entered by any court other than a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following the filing with the Clerk of the Supreme Court of a certified copy of such determination or judgment, accompanied by proof of service of notice of such filing upon the convicted attorney; provided, however, that if the convicted attorney shall prior to the 11th day file a petition with the Supreme Court to modify or terminate the suspension, then the suspension will be deferred until entry of an order upon the petition.

(4) *Disciplinary judgment after conviction.* If a determination or judgment of guilt of a felony is entered against a member of The Florida Bar and becomes final without appeal or

by affirmance on appeal, such judgment shall be conclusive proof of the guilt of the offense charged. The Florida Bar may thereafter petition the Supreme Court for issuance of a notice to the convicted attorney to show cause why appropriate disciplinary judgment should not be entered. The respondent attorney may, within fifteen (15) days, file his return with the Clerk of the Supreme Court. The Court shall direct such further proceedings as may be appropriate.

APPENDIX 2

American Bar Association,
Problems and Recommendations in Disciplinary Enforcement
122-130 (1970)

PROBLEM 22

No provision for suspension pending appeal of attorneys convicted of serious crimes (as defined on page 128) before the disciplinary proceeding based on the conviction is concluded.

DIMENSION

Failure to take prompt action against an attorney convicted of a crime permits him to continue to practice despite the conviction and undermines the public's confidence in the profession. Some jurisdictions, particularly those in the western United States whose procedure is patterned on that of California, provide for immediate suspension of attorneys convicted of "crimes involving moral turpitude." That term, however, is difficult to define, historically means different things in different jurisdictions and itself causes substantial litigation to determine whether a particular crime is one "involving moral turpitude." Its use as a criterion in disciplinary enforcement may cause additional embarassment to the profession. For example, it has been held that a conviction for the willful filing of false and fradulent income tax returns does not necessarily involve moral turpitude for purposes of the California statute authorizing the imposition of discipline. *Re Hallinan*, 43 Cal. 2d 243 (1954). It is, therefore, possible under such a provision for an attorney who has been convicted of a crime for which he may be subjected to a substantial period of imprisonment and fine to remain in good standing at the bar and not subject to any professional discipline for his crime.

RECOMMENDATION

A court rule providing for suspension pending appeal of an attorney convicted of a serious crime (as defined on page 128) until final disposition of a disciplinary proceeding based on the conviction, with provisions for immediate reinstatement should the conviction be reversed.

DISCUSSION

Many jurisdictions do not initiate any disciplinary action against an attorney convicted of a crime until all appeals have been exhausted. Others take immediate action if the crime involved is a felony but not otherwise. Under these procedures the attorney continues to practice, often for a number of years after the conviction. It does not even matter whether the crime involves conduct as an attorney; so long as an appeal is pending, the disciplinary process is stymied. One state bar counsel testified:

> Under our state bar rules, if any person is convicted of a felony, disbarment is compulsory. This is not automatic. It means you've got to file a pleading before the appropriate court and call the court's attention to it. Once the facts are established and there is a conviction, disbarment is compulsory. The court has no discretion.
>
> We have a continued discussion as to what constitutes conviction. Many committees say it must be a final conviction, and some of them go to extreme lengths. For instance, we had a situation where there was a man serving time in the penitentiary. At all times he had a writ of habeas corpus pending in some federal court. That committee took the attitude that that conviction was not final.

A similar situation was described by the president of a state bar:

> We have a member of our bar who has been tried three times in the United States district court. I think one was a

mistrial, a new trial and a conviction in the third trial of false swearing in a bankruptcy and concealing assets. His conviction was confirmed by the court of appeals. The mandate was stayed so that he could file a petition for certiorari in the Supreme Court of the United States, and he is at large. As far as I know he is continuing to swear and, I presume, falsely. I don't know.

We are deeply concerned with the fact that he is at large and that he is privileged to injure people that place their confidence and trust in him.

The public is unable to comprehend why an attorney convicted of stealing funds from a client can continue to handle client funds; or why an attorney convicted of securities fraud can continue to prepare and certify registration statements; or why an attorney convicted of filing a fraudulent income tax return can continue to prepare and file income tax returns for clients; or why an attorney convicted of conspiracy to suborn perjury can continue to try cases and present witnesses; or why an attorney convicted of bribing officials of an administrative agency can continue to practice before the very agency he has corrupted; or, indeed, why an attorney convicted of a serious crime of any nature can continue to hold himself out as an officer of the court obligated to uphold the law and to support the administration of justice. The chairman of a state bar association disciplinary agency explained:

A very prominent member of the bar was convicted, I think in early 1964, for embezzlement. He appealed ultimately to our court of last resort and certiorari was granted. Now, that man is practicing law. And, in fact, arguing cases before the court of appeals for five years now.

Now, the public cannot understand that. The public simply cannot understand how a man who has been convicted of embezzling large sums of public monies can be practicing law and arguing cases, and in truth, arguing cases before the court of appeals, while his appeal there on these convictions is still pending.

The Deputy Commissioner of Internal Revenue provided another illustration:

> First, take the case of the attorney who decided that he could be of greater assistance to his clients if he could assure them that their returns would not be audited, or if audited, that they would be closed without any tax change. So, for an extra fee, he bribed our agent, who in turn closed the cases requiring no change.
>
> When we in the Internal Revenue Service became suspicious of the employee, we had inspectors quietly begin an investigation designed to establish the truth or falsity of the suspicions. Having obtained evidence of our own employee's involvement in the scheme, we confronted him with our evidence, obtained his removal from the service, and persuaded him to become a witness against the attorney. Almost at once, our own house was back in order, having dismissed the dishonest employee, but what of the dishonest attorney?
>
> Our evidence was presented to the grand jury and he was indicted. Subsequently, after a period of time, his case came to trial, and he was convicted. He then filed an appeal to the court of appeals. This court affirmed the conviction. He filed an appeal for certiorari with the Supreme Court. The Supreme Court denied certiorari and he asked for a rehearing. The rehearing was denied, and eventually the trial court was directed to carry out the judgment of conviction.
>
> Appeals, as you know, take time. This one took approximately three years from the date the judgment of conviction was entered until the appeals were exhausted. In the meantime, this attorney, convicted of bribery, was free to continue his practice before the Internal Revenue Service, I think to the detriment of the entire profession and to the consternation of the Service, who knew him for what he was—a convicted felon, capable of suborning a heretofore honest and trusted employee.

No single facet of disciplinary enforcement is more to blame for any lack of public confidence in the integrity of the bar

than the policy that permits a convicted attorney to continue to practice while apparently enjoying immunity from discipline. The chairman of a state bar disciplinary agency testified:

> We do not have automatic disbarment as you asked just now. Many times people are lenient towards those who are convicted. That is especially true in the area of income tax convictions. We have one attorney who served 18 months in one of our fine federal prisons; and nothing was ever done about his case. He is walking around practicing law and I have been unable to explain to the people in my district why that man is still practicing. Nothing was done about it. Some members of the governing body took the position that that was a civil matter and it was up to the federal government to collect the taxes and that the grievance committee was not going to go out and undertake to disbar people. That had been established as the policy, and I don't know what to do about it, but it is the most difficult situation to explain to the lay public.

The effect that prompt action against attorneys convicted of serious crimes has on the profession's reputation was illustrated in the testimony of a former member of a state bar board [of] governors:

> We do have an automatic suspension on conviction of a crime. Our rule of court provides if it appears to the state supreme court that a member of the state bar has been convicted of a misdemeanor involving moral turpitude or a felony the supreme court must suspend such member summarily. This doesn't mean only convictions in this state; this means a conviction anywhere. Since the adoption of that policy, we are happy to relate that there has been a dearth, an absolute dearth, of public or news media complaints about lawyers practicing following a conviction.
>
> What drove us to get this rule was our news media, who, being quite interested in the activities of the legal profession, made numerous complaints about letting lawyers continue to practice after being convicted of a crime.

The consequences of permitting the convicted attorney to continue to practice are not limited to the adverse effect upon the reputation of the profession. The clients of the convicted attorney suffer also. One who is unaware of the conviction might retain the attorney and unwittingly compromise his rights. Adversary counsel aware of the conviction may be reluctant to negotiate with the attorney, to enter on a settlement with him, to entrust him with an escrow fund, or to be associated with him of counsel. These are all circumstances totally unrelated to the merits of the client's cause, and they may impair it. Moreover, the conviction may be affirmed and the attorney sent to prison while the new client's claim is pending. The client will then be forced to employ new counsel, who will have to familiarize himself with the matter. This means more delay and considerable duplication of expense to the client.

There is a further threat to the convicted attorney's client. The attorney, aware that the conviction ultimately will result in his disbarment, and, assuming that he has little to lose, he may engage in serious misconduct toward his remaining clients for his own personal gain.

A policy which thus jeopardizes the rights of innocent clients cannot be justified. Quite incongruously, the profession generally recognizes these considerations in the procedures by which it processes conventional disciplinary proceedings. Discipline imposed in those proceedings is not deferred automatically because the attorney seeks to appeal the adverse finding. We are unable to find any rationale for a procedure that affords greater protection to the attorney convicted under the reasonable doubt standard of the criminal procedure than it does to the attorney found guilty in a conventional disciplinary proceeding by a preponderence of the credible evidence, the standard of proof required in most jurisdictions.

We recommend that attorneys convicted of serious crimes be suspended immediately until a disciplinary proceeding

based on the conviction is concluded and final discipline imposed. Our use of the term "serious crime" is a recognition that not every act denominated a crime so clearly reflects upon an attorney's fitness that suspension prior to imposition of discipline is warranted. The jurisdictions that now provide for immediate suspension of convicted attorneys distinguish crimes on the basis of whether they involve "moral turpitude." Experience indicates, however, that that term is too imprecise and has resulted in inconsistent decisions by courts as to whether particular crimes do or do not involve moral turpitude. We prefer to use "serious crime" and to define it in our proposed rule.

A necessary corollary to the prompt suspension of attorneys convicted of serious crimes is the implementation of a procedure whereby an attorney so suspended can be reinstated promptly should the conviction be reversed on appeal. Once the basis for suspension no longer exists, the suspension itself must be removed, lest injustice be perpetrated.

We envision the following procedure, which is predicated on present practice in California, except for the substitution of the term "serious crime" (together with its definition) in place of the term "crime involving moral turpitude."

Upon receipt of a certificate showing that an attorney has been convicted of a crime, the court having disciplinary jurisdiction shall determine whether the crime constitutes a "serious crime" as defined in the proposed rule. If the conviction is for a "serious crime," the court having disciplinary jurisdiction will enter immediately an order suspending the attorney pending the conclusion of a disciplinary proceeding to be instituted on the basis of the conviction and the imposition of final discipline.

At the same time the court having disciplinary jurisdiction either will enter an order instituting a disciplinary proceeding and appointing the local disciplinary agency to prosecute it (in nonintegrated bar states) or will refer the matter to the state

bar for the institution of a disciplinary proceeding (in integrated bar states). The disciplinary proceeding will not be brought to a hearing, at which the sole issue will be the measure of discipline to be imposed, until all appeals are concluded and the conviction is final.

Should the conviction be reversed on appeal while the attorney is suspended, the attorney need only file a certificate showing the reversal with the court having disciplinary jurisdiction, and it will forthwith enter an order reinstating him. That order will not affect the pending disciplinary proceeding, which continues until concluded.

If the conviction does not involve a serious crime, the court having disciplinary jurisdiction will not suspend the attorney immediately but will refer the certificate of conviction to the appropriate disciplinary agency for whatever action, including the institution of a disciplinary proceeding, it deems warranted. In addition, the court may, by appropriate rule, exclude minor offenses such as traffic infractions from this process.

Responsibility for forwarding the certificate of an attorney's conviction to the court having disciplinary jurisdiction will be placed on the clerks of courts of original criminal jurisdiction within the state and on the disciplinary agency.

Implementation of this proposed procedure will have the additional benefit of dramatically reducing delay before final disposition of disciplinary proceedings grounded on criminal convictions. Under present practice, the attorney prolongs the appeal for as long as he can since disciplinary action is deferred while the appeal is pending. Once the attorney is suspended immediately from practice until the subsequent disciplinary proceeding is concluded, and that proceeding is deferred while appeals are pending, it will be in the attorney's interest to expedite the appellate process.

Some representatives of disciplinary agencies that appeared before this Committee in the course of its regional hearings

expressed some doubt as to the constitutionality of suspending a convicted attorney while an appeal is pending. We do not share these doubts. Due process is satisfied if the attorney is advised of the charges, witnesses against him are produced and subjected to cross-examination and he is given the right to adduce testimony and to testify in his own behalf. These rights are all accorded to the attorney in the course of the prosecution. Moreover, while discipline may be imposed in a proceeding in which the standard of proof is only that which prevails in civil cases, guilt in the criminal case must be established by the far more exacting standard of proof beyond a reasonable doubt.

It is significant to note that the procedure adopted by the Supreme Court of the United States in supervising the members of its bar includes suspension pending the conclusion of a disciplinary proceeding and the imposition of final discipline. Revised Rule 8 of the rules of that court provides that:

> Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within 40 days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the 40 days if no response is made, the court will enter an appropriate order; but no order of disbarment will be entered except with the concurrence of the majority of the justices participating.

PROPOSED RULE

A rule providing for immediate suspension of attorneys convicted of serious crimes should include the following provisions:

1. An attorney will be suspended automatically upon his conviction of a serious crime, whether the conviction resulted

from a plea of guilty or nolo contendere or from a verdict after trial, and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction.

2. The term "serious crime" means a felony or any specified lesser crime a necessary element of which, as determined by the statute defining such crime, reflects upon the attorney's fitness. The lesser crimes to be specified in the rule should include, for example, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file an income tax return, deceit, corruption, coercion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a "serious crime." (In recommending that the determination of whether the lesser crime reflects on the attorney's fitness be made from reference to the statute defining the crime, we are suggesting a significant variation from the California procedure. In that state the determination of whether a crime is one involving moral turpitude is made in some instances by reference to the evidence in the criminal prosecution rather than solely on the basis of the provisions of the criminal statute. This can lead to the ironic situation in which one attorney may be disbarred and another not subject to any discipline, although both have been convicted of violation of the same criminal statute.)

3. An attorney will be reinstated immediately on the reversal of his conviction for a serious crime that has resulted in his automatic suspension, but the reinstatement will not terminate any disciplinary proceeding then pending against the attorney.

4. A certificate of the conviction of an attorney for any crime shall be conclusive evidence of his guilt of that crime in any disciplinary proceeding instituted against him and based on the conviction.

5. Upon the receipt of a certificate of conviction of an attorney of a serious crime, the court having disciplinary juris-

diction will not only suspend him from practice but also will immediately institute a disciplinary proceeding in which the sole issue to be determined will be the extent of the final discipline to be imposed, and the court will refer the matter to the appropriate disciplinary agency for that purpose, provided, that a disciplinary proceeding so instituted will not be brought to hearing until all appeals from the conviction are concluded.

6. Upon the receipt of a certificate of conviction of an attorney for a crime not constituting a serious crime, the court having disciplinary jurisdiction will refer the matter to the appropriate disciplinary agency for whatever action, including the institution of a disciplinary proceeding, it may deem appropriate, provided, however, that the court in its discretion will make no reference with respect to convictions for minor offenses.

7. The clerk of any court within the state in which an attorney is convicted will transmit a certificate of conviction to the court having disciplinary jurisdiction and to the appropriate disciplinary agency within a specified period after the conviction.

8. Any disciplinary agency, upon receiving information that an attorney admitted to practice in the state has been convicted of a crime in a court within that state, will determine whether the clerk of the court where the conviction occurred has forwarded a certificate of the conviction to the court having disciplinary jurisdiction. If the certificate has not been forwarded by the clerk or if the conviction occurred in another state, the disciplinary agency will obtain a certificate of the conviction and forward it.